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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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PAULEY PETERSEN & ERICKSON 2800 WEST HIGGINS ROAD HOFFMAN ESTATES, IL 60195			EXAMINER STEPHENS, JACQUELINE F	
			ART UNIT 3761	PAPER NUMBER
DATE MAILED: 06/29/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

SP

Office Action Summary

Application No.

10/024,634

Applicant(s)

FRIDERICH ET AL.

Examiner

Jacqueline F. Stephens

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3761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11/10/04 and 4/15/05.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1, 2, 4-6, 8-10, 12 and 14-25 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 2, 4-6, 8-10, 12, 14-25 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Response to Arguments

1. Applicant's arguments filed 4/15/05 have been fully considered but they are not persuasive. Applicant argues the specification and claims of the present invention are such that a person having ordinary skill in the art would understand with reasonable certainty the meaning of the specification and the claims and that no undue experimentation would be required to make and use the present invention. However, claims set forth the physical characteristics desired of the material in the containment flap rather than the specific composition and structure of the flap in the end product. Therefore, relying on Ex parte Slob, 157 USPQ 172, such claims could cover any conceivable combination of materials whether presently existing or which might be discovered in the future and which would impart the desired characteristic, i.e. the claims are too broad and indefinite since they purport to cover everything having the characteristics regardless of its composition. For these reasons, the examiner concludes the specification fails to teach how to make and use the claimed invention without undue experimentation or that the scope of enablement provided to one skilled in the art is not commensurate with the scope of protection sought by the claims.

As to the rejection of claims 1, 4, and 8 as being unpatentable over McCormack USPN 5855999 and in response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that

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any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

As to the rejection of claims 1, 6, 9, 10, 15, 16, and 25 as being unpatentable over Buell USPN 5085654, it is assumed from the comments on page 14, paragraph 3, that applicant's arguments are directed to alleged impermissible rationalization. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

2. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in

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the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Morman USPN 5226992 is relied on for a teaching of materials, specifically a teaching of equivalent structure of a polyether block amide film and a polyethylene film. One of ordinary skill in the art recognizes the materials may be modified to arrive at a desired elongation, thus the prior art Morman is not relied on for a teaching of modulus of elongation.

3. In response to applicant's argument that Sauer contains no teaching regarding the containment flap as per the present claim 9, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Claim Rejections - 35 USC § 112

4. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

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5. Claims 1, 2, 4-6, 8-10, 14-19, and 21-25 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. The test procedures for determining a Young's modulus and a modulus of elasticity as recited in claims 1, 8, and 9 are not enabled by the disclosure. The test characteristics cited in the application do not include the test procedures.

6. Claims 1, 2, 4-6, 8-10, 14-19, and 21-25 are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for the embodiments taught in examples 1 and 2 on page 26 of the disclosure, does not reasonably provide enablement for other types of materials or combinations of construction. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make the invention commensurate in scope with these claims. The disclosure on pages 24, lines 11-15 and page 25, line 5 through page 26, line 2 teaches a broad range of microporous films, i.e. filled, unfilled, stretched, unstretched; and processes for forming nonwoven webs suitable for the invention, but notwithstanding the examples found on page 26, fails to teach one of ordinary skill in the art the exact film needed or the exact process for forming the nonwoven web to provide the claimed test results. Without this disclosure, one of ordinary skill cannot practice the invention without undue experimentation because of the number of operational parameters in the process and uncertainty as to the process for forming the nonwoven web.

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

9. Claims 1, 2, 4, and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over McCormack USPN 5855999.

As to claims 1 and 8, McCormack discloses a breathable, liquid impervious material. Regarding the limitations of a liquid impervious material used for a containment flap in an absorbent article, the language is directed to an intended use of the material. Intended use must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ

458, 459 (CCPA 1963). If the prior art structure is capable of performing the intended use, then it meets the claim limitations. McCormack discloses her invention has applicability in absorbent articles where comfort, breathability, and liquid impermeability are desired (col. 1, lines 18-31). Additionally McCormack discloses a laminate of the material can be formed, which is very soft (col. 6, lines 43-45). McCormack discloses the material is a laminate of thermoplastic film and nonwoven facing materials (col. 5, lines 45-55). The combination of liquid impermeability and softness creates a material that is capable of being used as a containment flap in an absorbent article.

McCormack discloses the present invention substantially as claimed. However, McCormack does not disclose the material has a Young's modulus (modulus of elasticity) of up to about 14 psi/% in the first axis and a Young's modulus of up to about 212 psi/% in the second axis. However, pages 24, line 10 through page 26, line 2 of the specification sets forth materials and structure capable of having the claimed modulus of elasticity. McCormack teaches similar materials for the film layer, particularly, a breathable bonded laminate (col. 3, line 55 through col. 4, line 59 and col. 5, line 55 through col. 6, line 31). Thus, McCormack obviously includes film layer capable of having the claimed modulus of elasticity. When the structure recited in the reference is substantially identical to that of the claims of the instant invention, claimed properties or functions are presumed to be inherent (MPEP 2112-2112.01). A *prima facie* case of either anticipation or obviousness has been established when the reference discloses all the limitations of a claim except a property or function and the examiner can not

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determine whether or not the reference inherently possesses properties which anticipate or render obvious the claimed invention but has basis for shifting the burden of proof as in *In re Fitzgerald*, 619 F.2d 67, 70 205 USPQ 594, 596 (CCPA 1980). In the present case, the reference has met the structural requirements of claim 1.

As to claim 2, McCormack discloses the present invention substantially as claimed. However, McCormack does not specifically disclose WVTR value of greater than about 5,000 gsm/24 hrs. McCormack teaches WVTR rates as high as 4300 g/m²/24hours. Additionally, McCormack recognizes the stretching of the film can be varied and this will affect the WVTR (col. 14, lines 11-26). McCormack, therefore recognizes the WVTR is a result effective variable of orientation and degree of stretching of the film. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the article of McCormack with the claimed WVTR, since discovering an optimum value of a result effective variable involves only routine skill in the art.

As to claim 4, McCormack discloses the nonwoven facing material is a polypropylene spunbond (col. 8, line 66 through col. 9, line 2).

10. Claims 1, 6, 9, 10, 15, 16, and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Buell USPN 5085654.

As to claims 1 and 9, Buell discloses an absorbent article **10** comprising: an absorbent chassis, the chassis having a longitudinal axis **18** and a containment flap **15**. Buell incorporates by reference Hartwell (Buell col. 2, lines 9-19 and col. 6, line 68 through col. 7, line 8) who discloses a laminate material suitable for a backsheet (Hartwell col. 3, lines 28-38). Buell discloses the containment flap comprises the same material as the backsheet (col. 11, lines 5-7, 43-44, and 51-57). Therefore, Buell discloses a laminate of thermoplastic film and nonwoven facing materials. Buell further discloses the flap has a free edge and an attached edge, the attached edge being attached to the chassis (Figures 1, 3, and 4). Buell further discloses the flap may comprise an elastomeric film (col. 12, lines 26-38), which is old and well known in the art to be extensible in the lateral and longitudinal directions.

Buell discloses the present invention substantially as claimed. However, Buell does not disclose the material has a Young's modulus (modulus of elasticity) of up to about 14 psi/% in the first axis and a Young's modulus of up to about 212 psi/% in the second axis. However, pages 24, line 10 through page 26, line 2 of the specification sets forth materials and structure capable of having the claimed modulus of elasticity. Buell teaches similar materials for the film layer, particularly, a breathable bonded laminate (col. 7, lines 5-7 and Buell incorporates by reference Hartwell who discloses a laminate material suitable for a backsheet Hartwell col. 3, lines 28-38). Thus, Buell obviously includes film layer capable of having the claimed modulus of elasticity. When the structure recited in the reference is substantially identical to that of the claims of the instant invention, claimed properties or functions are presumed to be inherent (MPEP

2112-2112.01). A *prima facie* case of either anticipation or obviousness has been established when the reference discloses all the limitations of a claim except a property or function and the examiner can not determine whether or not the reference inherently possesses properties which anticipate or render obvious the claimed invention but has basis for shifting the burden of proof as in *In re Fitzgerald*, 619 F.2d 67, 70 205 USPQ 594, 596 (CCPA 1980). In the present case, the reference has met the structural requirements of claims 1 and 9.

As to claims 6 and 10, Buell discloses the barrier material comprises a microporous film (col. 7, lines 6-8 where Buell incorporates by reference Hartwell who describes a microporous film as a breathable backsheet (Hartwell col. 3, lines 29-31).

As to claim 15, Buell discloses the flap is integral with an outer cover of the article (Figure 4).

As to claim 16, Buell discloses the flap includes elastics within the flap to supply a tensioning force (col. 8, lines 1-33).

As to claim 25, Buell discloses the absorbent article of claim 9, comprises one of a diaper; a training pant; an article of swim wear; an absorbent underpant; an adult incontinence article; a feminine hygiene article; or a medical protective garment (Figure 1).

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11. Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over McCormack in view of Morman USPN 5226992.

McCormack discloses the present invention substantially as claimed. However, McCormack does not disclose the nonwoven facing material has a basis weight of 0.4 osy. Morman discloses a neckable material having a basis weight of 0.4 osy (col. 6, lines 5-21 and col. 9, lines 1-7) for the benefit of economically producing a disposable product. Morman further discloses the material is necked to about 45% of its original width (col. 9, line 35-41). Morman teaches the relation between the original dimensions of the neckable material to its dimensions after tensioning determine the approximate limits of stretch of the composite elastic necked-bonded material. Morman further teaches the elastic limit of the elastic sheet needs only to be as great as the minimum desired elastic limit of the composite elastic necked-bonded material. Morman, therefore recognizes the elastic limit is a result effective variable of the percentage of necking. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the article of McCormack with the claimed percentage of necking, since discovering an optimum value of a result effective variable involves only routine skill in the art, and Morman additionally teaches the necked percentage is desired.

The layer further comprises spunbond substantially continuous polypropylene fibers (McCormack col. 10, lines 63-65).

McCormack discloses the claimed invention except that McCormack discloses polyethylene films instead of polyether block amide film. Morman shows that

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for the purpose of his invention, polyether block amide film is an equivalent structure known in the art (col. 5, lines 61-66, col. 6, line 55 through col. 7, line 2; and col. 11, lines 43-55). Morman discloses a polyamide polyether copolymer (col. 4, lines 36-40) and incorporates by reference (Morman col. 5, lines 61-66 Killian et al. USPN 4923742 who discloses a polyether block amide film Killian, Abstract). Therefore, because these two were art-recognized equivalents at the time the invention was made, one of ordinary skill in the art would have found it obvious to substitute polyether block amide film for polyethylene film.

Morman/McCormack disclose an elastic sheet having a basis weight of 0.5-10 osy, which includes the claimed range (col. 9, lines 1-2), and can comprise a polyamide film (col. 11, lines 43-55).

12. Claims 9, 11, 12, 14, and 17-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over McCormack in view of Sauer USPN 5938652.

As to claim 9, McCormack discloses an absorbent article comprising an absorbent chassis, which inherently has a longitudinal axis (col. 10, lines 43-52). McCormack discloses her invention is suitable for use as a topsheet or backsheet in an absorbent article (col. 10, lines 43-52). However, McCormack does not additionally disclose a containment flap. Sauer discloses a containment flap comprising a laminate or breathable, microporous film (col. 9, lines 28-41), which can be formed from an extension of the topsheet or backsheet (col. 9, lines 1-2) for the benefit of better

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containment of body exudates and, in particular, runny fecal material (col. 3, lines 31-34). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the absorbent article of McCormack to include containment flaps for the benefits disclosed in Sauer. McCormack/Sauer discloses the containment flap comprises a transversely extendible film (Sauer col. 3, lines 18-22).

McCormack/Sauer discloses the present invention substantially as claimed. However, McCormack/Sauer does not disclose the material has a Young's modulus (modulus of elasticity) of up to about 14 psi/% in the first axis and a Young's modulus of up to about 212 psi/% in the second axis. However, pages 24, line 10 through page 26, line 2 of the specification sets forth materials and structure capable of having the claimed modulus of elasticity. McCormack teaches similar materials for the film layer, particularly, a breathable bonded laminate (col. 3, line 55 through col. 4, line 59 and col. 5, line 55 through col. 6, line 31). Thus, McCormack/Sauer obviously includes film layer capable of having the claimed modulus of elasticity. When the structure recited in the reference is substantially identical to that of the claims of the instant invention, claimed properties or functions are presumed to be inherent (MPEP 2112-2112.01). A *prima facie* case of either anticipation or obviousness has been established when the reference discloses all the limitations of a claim except a property or function and the examiner can not determine whether or not the reference inherently possesses properties which anticipate or render obvious the claimed invention but has basis for shifting the burden of proof as in *In re Fitzgerald*, 619 F.2d 67, 70 205 USPQ 594, 596

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(CCPA 1980). In the present case, the reference has met the structural requirements of claim 9.

As to claim 14, McCormack/Sauer discloses the containment flap has a long axis and a transverse axis, the long axis being parallel to the longitudinal axis of the chassis, the flap having a tensioning force in its long axis in that it is well known in the art that a stretch-bonded laminate, such as described in McCormack, provides an elastic property in at least the longitudinal direction, and generally in the lateral direction as well. McCormack/Sauer further disclose the flap has a low modulus of elasticity in its transverse axis and being extendible in its transverse axis - see col. 10, lines 2-38 where Sauer discloses it is desirable for the containment flap to be less extensible in the transverse direction to provide a more optimum fit and seal about the front abdominal region of a wearer.

As to claim 17, McCormack/Sauer discloses the transversely extendible film is a microporous film of about 10 to about 68 weight percent predominately linear polyolefin polymer about 2 to about 20 weight percent of a bonding agent, and about 30 to about 80 weight percent particulate filler (McCormack col. 3, lines 55-62).

As to claim 18, McCormack/Sauer discloses the polyolefin polymer is a linear low density polyethylene (McCormack col. 4, lines 3-6 and col. 5, lines 14-17).

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As to claim 19, McCormack/Sauer discloses the microporous film comprises a filler and first and second polymers, the first polymer being a blend of ethylene and propylene (McCormack col. 4, lines 5-6 and col. 6, lines 24-31).

As to claim 21, McCormack/Sauer discloses the spunbond material is a polyolefin (McCormack col. 9, lines 1-2).

As to claim 22, McCormack/Sauer discloses the spunbond material is polypropylene (McCormack col. 9, lines 1-6).

As to claim 23, McCormack/Sauer discloses the flap comprises crimped nonwoven/extensible film laminates (McCormack col. 9, lines 7-15 describes crimped fibers constituting the nonwoven material. McCormack col. 4, lines 3-29 and col. 9, lines 50-61 disclose the film is extendible).

As to claim 24, McCormack/Sauer discloses the film comprises a stretched microporous film (McCormack col. 4, lines 12-19 and Sauer col. 9, lines 39-41 and col. 13, line 50 through col. 14, line 24).

Conclusion

4. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

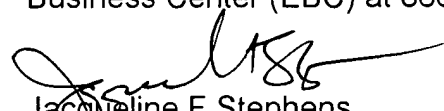
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jacqueline F. Stephens whose telephone number is (571) 272-4937. The examiner can normally be reached on Monday-Friday 9:00-5:30.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Larry Schwartz can be reached on (571) 272-4390. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Jacqueline F Stephens
Examiner
Art Unit 3761

June 24, 2005


Larry I. Schwartz
Supervisory Patent Examiner
Group 3700